(3)

Supreme Court, U.S.
FILED
MAR 22 2004
OFFICE OF THE CLERK

No. 03-1184

IN THE

Supreme Court of the United States

DONALD J. DIBBLE,

Petitioner,

v.

JOHN H. FENIMORE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Of Counsel:

CAITLIN J. HALLIGAN*
Solicitor General

DANIEL SMIRLOCK
Deputy Solicitor General

NANCY A. SPIEGEL
Senior Assistant Solicitor General

MICHAEL S. BUSKUS
Assistant Solicitor General

ELIOT SPITZER
Attorney General of the State of New York
120 Broadway
New York, NY 10271
(212) 416-8016

Attorney for Respondent

* *Counsel of Record*

186517

CP

BEST AVAILABLE COPY

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether a claim for equitable relief in an action under 42 U.S.C. § 1983 by a former member of the New York Air National Guard against the head of the Guard, based on intra-service personnel decisions allegedly taken by the commanding officer in retaliation for the subordinate's exercise of First Amendment rights, is justiciable.

TABLE OF CONTENTS

	Page
Counterstatement of Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of the Case	1
Reasons for Denying the Petition	2
I. The Case Is Not Finally Decided.	2
II. Because The Pending Action May Produce The Relief Petitioner Seeks, The Case Is Not Ripe For Review.	3
III. Petitioner Exaggerates The Conflict Among The Circuits Regarding The Scope Of Intramilitary Immunity.	4
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Brown v. Glines,
444 U.S. 348 (1980) 9

Chappell v. Wallace,
462 U.S. 296 (1983) 6, 8, 9

Christoffersen v. Wash. State Air Nat'l Guard,
855 F.2d 1437 (9th Cir. 1988) 7

Crawford v. Texas Army Nat'l Guard,
794 F.2d 1034 (5th Cir. 1986) 7

Frontiero v. Richardson,
411 U.S. 677 (1973) 9

Grimley, In re,
137 U.S. 147 (1890) 5

Jones v. N.Y. State Div. of Military & Naval Affairs,
166 F.3d 45 (2d Cir. 1999) 9

Jorden v. Nat'l Guard Bureau, 799 F.2d 99
(3d Cir. 1986), *cert. denied sub nom.*
Sajer v. Jorden, 484 U.S. 815 (1987) 8, 9

Knutson v. Wisconsin Air Nat'l Guard,
995 F.2d 765 (7th Cir. 1993) 7

Cited Authorities

Page

Kreis v. Secretary of the Air Force,
866 F.2d 1508 (D. C. Cir. 1989) 7

Orloff v. Willoughby,
345 U.S. 83 (1953) 5, 6, 9

Parker v. Levy,
417 U.S. 733 (1974) 9

Schlesinger v. Councilman,
420 U.S. 738 (1975) 5

Speigner v. Alexander,
248 F.3d 1292 (11th Cir. 2001) 7, 10

Stencel Aero Engineering Corp. v. United States,
431 U.S. 666 (1977) 6

Tennessee v. Dunlap,
426 U.S. 312 (1976) 1

Toth v. Quarles,
350 U.S. 11 (1955) 5

United States v. Shearer,
473 U.S. 52 (1985) 6

United States v. Stanley,
483 U.S. 669 (1987) 8, 9

Cited Authorities

Page

Walden v. Bartlett,
840 F.2d 771 (10th Cir. 1988) 8

Watson v. Arkansas Nat'l Guard,
886 F.2d 1004 (8th Cir. 1989) 3, 7, 9

Wigginton v. Centracchio,
205 F.3d 504 (1st Cir. 2000) 8, 10

Statutes:

5 U.S.C. § 706(2)(A)-(E) 2

32 U.S.C. § 709 1

42 U.S.C. § 1983 1

New York Military Law § 262 3

Miscellaneous:

Robert L. Stern, *et al.*, SUPREME COURT PRACTICE
(7th ed. 1993) 3

STATEMENT OF THE CASE

Petitioner Donald J. Dibble was a federal civilian military technician, *see generally* 32 U.S.C. § 709 (describing duties and qualifications of such positions), whose continued employment was conditioned upon his retaining membership in the National Guard, *see* 32 U.S.C. § 709(b), (f). Thus, when he was denied reenlistment in the Guard by respondent John H. Fenimore, the commander of the New York Air National Guard, his employment was automatically terminated. *Id.*; *see also Tennessee v. Dunlap*, 426 U.S. 312, 313-16 (1976). After his separation from the Guard and consequent loss of employment, he brought this action under 42 U.S.C. § 1983 against respondent, alleging that he had been denied reenlistment in retaliation for his union activities. The complaint also sought relief against the Secretary of the Air Force in connection with the denial of petitioner's application to the United States Air Force Board for Correction of Military Records ("AFBCMR"). That board, which has broad administrative authority to review and correct military records, denied petitioner's request to "correct" his military records to declare that respondent had wrongfully denied petitioner reenlistment.

The district court denied respondent's motion to dismiss on the basis of, *inter alia*, intramilitary immunity. Pet. App. 17a, 26a. The court granted petitioner's cross-motion for partial summary judgment against the Secretary, finding that the decision of the AFBCMR was arbitrary and capricious, and remanded the matter to that board for a new determination. *Id.* at 27a-33a. The district court subsequently denied respondent's motion for reconsideration. *Id.* at 35a.

On respondent's appeal, in which the Secretary took no part, the Court of Appeals for the Second Circuit reversed and remanded with instructions to dismiss as to respondent on the basis of intramilitary immunity. *Id.* at 1a. Dibble's petition for rehearing and suggestion for rehearing en banc was denied. *Id.* at 42a.

REASONS FOR DENYING THE PETITION

I. THE CASE IS NOT FINALLY DECIDED.

Because this lawsuit remains pending against the Secretary in the district court, the case is not finally decided. After the district court remanded the matter to the AFBCMR, the board once again denied petitioner any relief. Following that determination, petitioner and the Secretary filed cross-motions for summary judgment in the district court. Petitioner's motion in the district court seeks to overturn, as arbitrary and capricious under 5 U.S.C. § 706(2)(A)-(E), the AFBCMR's decision on remand on the ground that the board made erroneous findings and misinterpreted the evidence in the administrative record. Specifically, petitioner challenges the AFBCMR's conclusion that he was denied reenlistment in the Guard based on his military performance. United States District Court for the Northern District of New York, Docket No. 97-CV-1256 (LEK), Docket Entry No. 94. The cross-motions remain pending at this time. *Id.*, Docket Entry Nos. 87 & 90.

The fact that this action remains open, and that petitioner's military status and records are thus still very much at issue in the district court, is reason enough not to

grant certiorari at this time. *See generally* Robert L. Stern, *et al.*, SUPREME COURT PRACTICE (7th ed. 1993), § 4.18. After final judgment, petitioner can again seek certiorari to obtain review of the interlocutory proceedings. *Id.*, § 2.2.

II. BECAUSE THE PENDING ACTION MAY PRODUCE THE RELIEF PETITIONER SEEKS, THE CASE IS NOT RIPE FOR REVIEW.

The case is in any event not ripe for this Court's review. If petitioner obtains the relief he seeks against the Secretary -- namely, a declaration that he had been denied reenlistment for impermissible reasons rather than due to military performance, as well as the associated correction of his records -- respondent may agree to reinstate petitioner, thereby eliminating any controversy for this Court to resolve.

To be sure, respondent would not be bound, in his capacity as the head of the New York Air National Guard, by a determination of the AFBCMR or the Secretary (whether acting on their own or pursuant to court order) to restore petitioner's federal status, since the AFBCMR "does not have the power to reinstate a dismissed member of a state national guard." *See Watson v. Arkansas National Guard*, 886 F.2d 1004, 1008 n.11 (8th Cir. 1989). In practice, however, New York generally follows federal National Guard policies. *See* N.Y. Military Law § 262 ("[a]ll matters relating to the organization, discipline and government of the organized militia, not otherwise provided for in this chapter or in regulations issued pursuant thereto, shall be decided by the customs and usage of the appropriate force or forces of the armed forces of the United States"). While respondent respectfully asserts and preserves his right to determine

whether to reinstate petitioner to the New York Air National Guard if petitioner is eventually accorded relief against the Secretary, it would be consistent with general policy and considerations of comity for respondent to do so.

Thus, petitioner's objection to according respondent intramilitary immunity can await final judgment of the claim against the AFBCMR in the courts below. At that point, petitioner may have no need to seek this Court's intervention. And if petitioner fails to obtain relief against the Secretary, he may petition this Court at that time and request review of the judgment in respondent's favor, as well as any judgment in favor of the Secretary. At the very least, by awaiting final judgment, the issues regarding petitioner's military status, both state and federal, will be presented more concretely and completely.

III. PETITIONER EXAGGERATES THE CONFLICT AMONG THE CIRCUITS REGARDING THE SCOPE OF INTRAMILITARY IMMUNITY.

In support of his petition for certiorari, petitioner overstates the conflict among the circuits regarding the scope of intramilitary immunity, particularly as applied to military personnel decisions. The decision of the Second Circuit is entirely consistent with the decisions of this Court, and the few circuit court decisions favoring petitioner's view of the law are incorrect.

As this Court has recognized, life in the military is not comparable to civilian employment. Because it is "'the primary business of armies and navies to fight or be ready to fight wars should the occasion arise,' . . . the military must insist upon a respect for duty and a discipline without

counterpart in civilian life." *See Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975) (*quoting Toth v. Quarles*, 350 U.S. 11, 17 (1955)). The right of command and the corollary duty of unquestioned obedience are vital aspects of military authority. *See In re Grimley*, 137 U.S. 147, 153 (1890).

This Court, cognizant of the importance of national defense and of the role that effective chains of command play in military activities, has been extremely reluctant to permit the courts, in the guise of redressing claims of discrimination in the military, to assume "the task of running the Army." *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953). In *Orloff*, an Army solider, dissatisfied with his assignment as a medical laboratory technician (a job that he claimed was given to him as a result of his refusal to take an anti-Communist oath), asked the courts to order either his reassignment to duties as a physician and psychiatrist with a commensurate rank as a commissioned officer, or his release and discharge from the military. *Id.* at 85-86. His claim for injunctive relief was bolstered by the Government's concession in this Court that soldiers who were inducted into the armed services under a statutory scheme that made physicians (like him) draft-eligible, although they otherwise would have been too old, were entitled to duties generally within a doctor's field of practice. *Id.* at 87-88.

While this Court was cognizant that discrimination in military assignments was a complaint "often made," it concluded that some uneven treatment is "unavoidable in the Army" because "[s]ome must be assigned to dangerous missions; others find soft spots." *Id.* at 93-94. This Court held that the courts were not the proper forum in which to air such grievances because Congress and the Executive branch had created channels within the military to resolve

such matters. Therefore, this Court instructed that "[o]rderly government requires that the judiciary be . . . scrupulous not to interfere with legitimate Army matters." *Id.* at 94.

Those principles of deference to military judgments and related considerations of separation of powers have formed the basis of intramilitary immunity decisions barring suits challenging disciplinary or personnel decisions. To permit such suits would substantially undermine the effectiveness of those in military command. *See Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673 (1977) (trials would inquire into the validity of military command decisions, inevitably second-guessing military orders and requiring members of the armed forces to testify as to the propriety of other officers' decisions and actions); *United States v. Shearer*, 473 U.S. 52, 58-59 (1985) (a suit that depends upon faulting officers' supervision and discipline of subordinates would impair military authority). Even to permit such suits to proceed would force commanding officers "to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether or how to place restraints on a solider's off-base conduct." *Shearer*, 473 U.S. at 58.

Those principles were held in *Chappell v. Wallace*, 462 U.S. 296 (1983), to bar a discrimination suit. The plaintiff claimed that he was disciplined more severely than other sailors, was given less desirable work assignments, and was otherwise treated unfairly, all on account of his race. This Court held that his suit was barred by intramilitary immunity.

These intramilitary immunity principles demonstrate that suits against officers in the chain of command, regardless of whether they seek damages or declaratory or injunctive relief, would impair military effectiveness and preparedness in several ways: First, they would embroil courts in second-guessing military supervision and discipline; second, they would undermine military authority by giving subordinates an opportunity to intimidate superior officers in an effort to gain better assignments or other benefits; third, they would force military officers to make decisions in anticipation of possible litigation, rather than on the basis of normal military considerations; fourth, the decisionmakers in such lawsuits would be juries or judges not necessarily trained or experienced in military methods and procedures; and finally, there are intramilitary administrative review procedures available that provide due process without the burdens associated with civil litigation.

This reasoning, central to the intramilitary immunity jurisprudence, has been embraced by the Courts of Appeals for the Fifth, Seventh, Eighth, Ninth, Eleventh and District of Columbia Circuits. *See Crawford v. Texas Army Nat'l Guard*, 794 F.2d 1034, 1036 (5th Cir. 1986); *Knutson v. Wisconsin Air Nat'l Guard*, 995 F.2d 765, 771 (7th Cir. 1993); *Watson*, 886 F.2d at 1007-10; *Christoffersen v. Wash. State Air Nat'l Guard*, 855 F.2d 1437 (9th Cir. 1988); *Speigner v. Alexander*, 248 F.3d 1292, 1296 (11th Cir. 2001); *Kreis v. Secretary of the Air Force*, 866 F.2d 1508 (D.C. Cir. 1989).

The Second Circuit joined this consensus in concluding that adding a prayer for injunctive or declaratory relief will not bring a claim outside the scope of intramilitary immunity and therefore make it justiciable. In a thoughtful and well-

considered opinion, the Second Circuit concluded, on the basis of the foregoing principles of intramilitary immunity, that claims for injunctive relief would intrude upon the personnel decisions that commanding officers must make as they prepare their forces for military combat or support roles.

Thus, the courts of appeals, including the Second Circuit in the case at bar, are largely in agreement that merely labeling a complaint as one for injunctive or declaratory relief does not vitiate the intramilitary immunity that would otherwise bar a suit challenging military discipline, staffing or personnel decisions. Pet. App. 11a-15a.

The few courts that have held to the contrary have misapplied core principles of intramilitary immunity and have woefully underestimated the damage to military authority that would result if individual personnel suits for injunctive relief could lie. *See Wigginton v. Centracchio*, 205 F.3d 504 (1st Cir. 2000); *Walden v. Bartlett*, 840 F.2d 771 (10th Cir. 1988); *Jorden v. Nat'l Guard Bureau*, 799 F.2d 99 (3d Cir. 1986), *cert. denied sub nom. Sajer v. Jorden*, 484 U.S. 815 (1987).

Nor do these cases present an acute conflict with the decision below. In *Walden*, the court did little more than observe that *Chappell* and *United States v. Stanley*, 483 U.S. 669 (1987), do not categorically bar equitable relief in the military sphere -- an unexceptionable proposition.[1] 840 F.2d at 775. As to *Jorden*, the Third Circuit

1. The Second Circuit, in declining to adopt a categorical rule barring all military suits for equitable relief, *see* Pet. A pp. 15a-16a, recognized that some claims for equitable relief are justiciable. For example, the court noted that facial constitutional and statutory challenges to military regulations have been entertained by the courts. (Cont'd)

relied heavily upon precedent that has little, if anything, to do with chain of command military discipline or personnel matters in concluding that courts may entertain suits for injunctive relief against commanding officers. Those cases involved facial constitutional challenges to military rules or regulations, *see id.* at 109, which the Second Circuit has acknowledged are justiciable. However, suits challenging legislation or Executive branch policy decisions are very different from suits to overturn enlistment, disciplinary or work assignment orders from commanding officers. Allowing the former does not directly undermine the authority of commanding officers, whereas permitting the latter would erode the fundamental chain of command structure and circumvent established intramilitary administrative review channels. *Jorden* gave little or no weight to those factors, all of which were central to the decision in *Stanley*, a post-*Chappell*, post-*Jorden* decision.

It is thus doubtful that *Jorden* retains much validity. Indeed, courts that have considered the question more recently have rejected *Jorden* and embraced *Watson*.

(Cont'd)

Pet. App. 10a-11a (citing *Brown v. Glines*, 444 U.S. 348 (1980); *Parker v. Levy*, 417 U.S. 733 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973)). Similarly, the Second Circuit has acknowledged that injunctive relief is available to redress a violation of procedural due process based on a failure to comply with a mandatory regulation. *See Jones v. N.Y. State Div. of Military & Naval Affairs*, 166 F.3d 45, 52 (2d Cir. 1999). However, neither exception to the principle of nonjusticiability empowers the courts to review individual military personnel decisions. *See Orloff*, 345 U.S. at 94-95 (courts may not review claims of soldiers that superior officers discriminated against them in work and duty assignments).

See Dibble, Pet. App. 14a, 16a; *Speigner*, 248 F.3d at 1296. Thus, the only recent case finding a claim for equitable relief in connection with an individual personnel decision justiciable is *Wigginton*, 205 F.3d 504. This one case, in the face of significant contrary authority, does not warrant a grant of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ELIOT SPITZER
Attorney General of the State of New York
120 Broadway
New York, NY 10271
(212) 416-8016
Attorney for Respondent

Of Counsel:

CAITLIN J. HALLIGAN*
Solicitor General

DANIEL SMIRLOCK
Deputy Solicitor General

NANCY A. SPIEGEL
Senior Assistant Solicitor General

MICHAEL S. BUSKUS
Assistant Solicitor General

* *Counsel of Record*

Supreme Court, U.S.
FILED
MAR 3 1 2004
OFFICE OF THE CLERK

(4)

No. 03-1184

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

DONALD J. DIBBLE,

Petitioner,

v.

JOHN H. FENIMORE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

Daniel M. Schember
Gaffney & Schember, P.C.
1666 Connecticut Avenue, N.W.
Suite 225
Washington, D.C. 20009
202/328-2244

March 31, 2004

Counsel of Record for Petitioner

I

The case against respondent has been finally decided and is ripe for review; delay likely would be prejudicial

The court below finally decided the case against respondent. The court held respondent immune from suit and ordered the complaint against him dismissed. App. 2a.

The lower court's immunity ruling is ripe for review. Contrary to the heading on page 3 of respondent's brief, the text of respondent's brief denies that "the pending action may produce the relief petitioner seeks" against respondent. Respondent denies that either petitioner's action against the Secretary of the Air Force or any independent order by the Secretary could require respondent to reinstate petitioner in the state National Guard. Opp. Br. at 3, *citing Watson v. Arkansas National Guard*, 886 F.2d 1004, 1008 n.11 (8th Cir. 1989). Indeed, respondent asserts that, with the complaint against him dismissed, nothing can compel him to afford petitioner any relief. Opp. Br. at 3-4.

Contrary to respondent's brief at 4, resolution of petitioner's claims against the Secretary will not present "more concretely and completely" any issue raised by petitioner's complaint against respondent. The claims against the Secretary entitle petitioner to judicial review of an administrative record. *Chappell v. Wallace*, 462 U.S. 296, 303 (1983). This review has no bearing on whether respondent is immune from suit, "an important issue completely separate from the merits of the action." App. 5a, *quoting Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

Delay in determining respondent's immunity likely would be prejudicial. Unlike the complaint against the

Secretary, the complaint against respondent arises under 42 U.S.C. § 1983 and must be proved by testimony of witnesses at a trial. Delay likely would diminish their availability and memories.

II

Respondent overlooks this Court's reasoning, contradictions among the decisions he embraces, and detachment of those decisions from justiciability principles

Respondent argues that official capacity defendants should be immune from intra-military suits for equitable relief--just as individual capacity defendants are immune from intra-military suits for damages--because, "regardless" of the relief sought, these "suits . . . impair military effectiveness and preparedness" and "undermine the authority of commanding officers." Opp. Br. at 7, 9. Respondent asserts there is "consensus" among seven circuits on this, and that contrary decisions "have misapplied core principles . . . and . . . woefully underestimated the damage" caused by their rulings. *Id.* at 7-8.[1] Inexplicably, though, respondent also says that the damaging decisions misapplying core principles do not "present an acute conflict with the decision below." *Id.* In this regard, respondent says "petitioner exaggerates." *Id.* at 4.

Respondent's analysis is flawed. Respondent overlooks that this Court's opinions in *Chappell v. Wallace*, 462 U.S. 296 (1983), and *United States v. Stanley*, 483 U.S. 669

---

[1] Respondent erroneously asserts that *Kreis v. Secretary of the Air Force*, 866 F.2d 1508 (D.C. Cir. 1989), is part of this consensus. In *Kreis*, the court held that correction board decisions denying military promotion are reviewable in official capacity suits for equitable relief.

(1987), distinguished official capacity suits for equitable relief from individual capacity suits for damages. *See, e.g., Stanley*, 483 U.S. at 683 ("redress designed to halt or prevent the constitutional violation" distinguishable from "award of money damages"). Respondent overlooks that the undermining of commanders that *Chappell* said must be avoided is undermining that would occur by "exposing officers to personal liability." *Chappell*, 462 U.S. at 304. Nothing in *Chappell* opposes the undermining of unlawful military personnel decisions. To the contrary, the Court said these decisions can be redressed. *Id.* at 303.

Respondent overlooks that the lower court decisions he cites, Opp. Br. at 7, conflict with *Jones v. New York State Division of Military and Naval Affairs*, 166 F.3d 45, 52 (2d Cir. 1998), which held that a state Guard member may obtain injunctive relief from the military's violation of its own regulations. Respondent consequently overlooks that justiciability principles provide no basis for distinguishing regulatory claims from statutory or constitutional claims, and that several courts have held statutory or constitutional claims justiciable. Pet. at 6. Respondent also overlooks a contrasting point. The Second Circuit itself has held that not all regulatory claims are justiciable. Pet. at 4, n.2. Respondent fails to explain how all constitutional and statutory claims "impair military effectiveness and preparedness in several ways," Opp. Br. at 7; but no regulatory claims present any of the same impairments. Respondent has no answer to our argument that distinguishing regulatory claims from statutory and constitutional claims is arbitrary and unsupported by any justiciability principle.

Respondent also overlooks that the lower court opinions he cites are supported by neither this Court's opinions, nor any justiciability principle, when they assert

that facial challenges to written standards are allowed, but challenges to individual decisions are not. *See* Pet. at 4. Respondent overlooks that in *Brown v. Glines*, 444 U.S. 348, 357 n. 15 (1980), the Court said permissible claims are not limited to facial challenges. Respondent fails to explain why it is improper to undermine an individual unconstitutional decision, though it is proper to undermine a regulation imposing the same unconstitutional action on many. Opp. Br. at 9. Respondent has no answer to our point that distinguishing cases based on whether they challenge a decision applicable to one, or a pronouncement applicable to many, is arbitrary and unsupported by any principle of justiciability--particularly where the decision and the pronouncement are unconstitutional for the same reason.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Daniel M. Schember
Gaffney & Schember, P.C.
1666 Connecticut Ave., N.W.
Suite 225
Washington, D.C. 20009
202/328-2244

Counsel of Record for Petitioner

March 31, 2004